

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

NEW ENGLAND CENTRAL RAILROAD, INC.,
Plaintiff,

v.

SPRINGFIELD TERMINAL RAILWAY
COMPANY and BOSTON AND MAINE
CORPORATION,

Defendants

Civil Action No.: 04-30235-MAP

PLAINTIFF'S OPPOSITIONS TO DEFENDANTS' MOTIONS IN LIMINE

The plaintiff, New England Central Railroad, Inc. (“NECR”), hereby files this Opposition to Defendant’s *Motions in Limine*.

1. The NECR Must be Permitted to Introduce Derailment Evidence:

NECR must be permitted to introduce relevant facts and evidence regarding the cause of and the derailment which is the subject of this litigation. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401.

All relevant evidence is generally admissible. Fed. R. Evid. 402. The NECR is prepared to introduce evidence relevant and related to the cause of the derailment through Michel Lawyer, Richard Boucher, and R.T. Boucher. Michael Lawyer (the NECR’s Roadmaster), who was the NECR’s Rule 30(b)(6) witness, is prepared to testify as to the track conditions, the NECR’s compliance with the FRA’s track safety standards, and the relevant track speeds. See Trans. Of Dep. of Michael Lawyer, relevant portions of which are attached at 11-21 (Exh. 1 hereto).

Richard Boucher (the NECR's Track Supervisor) is prepared to testify as to condition of the track at the time of the FRA Geometry Car inspection, the verification of the information discovered, and the necessary repairs as a result of the condition of the tracks following the derailment. See Trans. of Dep. of Richard Boucher, relevant portions of which are attached at 4-22 (Exh. 2 hereto). Rich Boucher (a Track Inspector for the NECR) is also prepared to testify regarding inspections of the track, the inspection and location of the defect found at MP 10.16, and inspection of the track after the derailment. See Dep. Trans. of Rick Boucher, relevant portions of which are attached at 7-12 (Exh. 3. hereto). These witnesses are qualified to testify about the cause as they regularly investigate causes of accidents and/or work to keep the track in good repair in the course of their everyday job duties.

The actual cause of the accident is, of course, a matter for the fact finder to determine; however, the cause of the derailment is no longer a relevant issue to be determined due to the fact that the Court has already set forth that the Defendants were ordered by the Interstate Commerce Commission (ICC), now the Surface Transportation Board (STB), to compensate Plaintiff for damages resulting from the derailment, in the absence of gross negligence by Plaintiff. See *Memorandum and Order Regarding Defendants' Motion for Partial Summary Judgment, Plaintiff's Motion for Summary Judgment and Plaintiff's Motion to Strike, "Order"* [Dkt. #92] at p.6, n. 2. In other words, absent a determination that the NECR was grossly negligent in maintaining its line, the Defendants are required to pay to the NECR its damages resulting from the derailment.

II. **NECR Must be Permitted to Introduce Evidence of the Trainmen's Standard of Care:**

NECR must be prepared to introduce relevant facts regarding the trainmen's standard of care. NECR is prepared to introduce the standard of care through Engineer Steven Larro. In his

deposition, Mr. Larro testified he has approximately thirty years of experience in the railroad, including experience as an engineer of locomotive. See Trans. of Dep. of Steven Larro, relevant portions of which are attached at 4-5 (Exh. 4. hereto). In addition, Mr. Larro will testify as to train handling and operating rules. *Id.* at 7-12. Due to his experience, Mr. Larro is competent to testify as to the standard of care relevant for the operation of locomotives.

With respect to the counter-claim on gross negligence, the issue of the trainmen's standard of care is not relevant. In the Court's *Order*, the Court allowed summary judgment with respect to Counts V-X of the Amended Complaint. [Docket #92] at P.3 ¶ 1. As such, all of the common law claims including Breach of Contract against B & M; Negligence against B&M; Gross Negligence, Willful, Wanton and Reckless Conduct against B & M; Breach of Contract against STRC; Negligence by STRC and Gross Negligence, Willful, Wanton and Reckless Conduct against STRC have been thrown out and only the statutory claims remain in this case.

Id.

In addition, the Court already concluded that "in the absence of gross negligence by Plaintiff, Defendants' refusal to compensate Plaintiff for damages resulting from the accident constituted a failure to obey" the Order imposed by the ICC. *Id.* As such, the applicable standard of care is not the ordinary the trainmen's standard of care. Instead, gross negligence, defined as "negligence that would shock the fair-minded," or "the failure to exercise even slight care" is applicable. *Shea v. Fridley*, 123 A.2d 358, 363 (D.C. 1956).

III. The NECR Must be Permitted to Introduce The Trackage Rights Order:

§ 7.1 of the ICC's 1990 *Trackage Rights Order* is not only relevant, but is the basis of the NECR's entire lawsuit. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence.” Fed. R. Evid. 401. All relevant evidence is generally admissible. Fed. R. Evid. 402. In the parties’ *Joint Pre-Trial Conference Memorandum* (“Joint Memo”), as part of the *Statement of the Facts Established by Pleading, Admissions, or by Stipulation*, both parties agreed that “the duties and obligations of the parties with respect to operation of trains over the line was governed by the ICC-imposed *Modified Trackage Rights Agreement (Agreement)*.” See *Joint Memo*, § II(E) [Docket 53]. In addition, the Court already ruled on the correct interpretation of the *Agreement* in its conclusion that “in the absence of gross negligence by Plaintiff, Defendants’ refusal to compensate Plaintiff for damages resulting from the accident constituted a failure to obey” the Order imposed by the ICC. *Order*, p.6 n. 2 [Docket 92].

If, however, the Defendant is stipulating that the Court has already found that Defendants’ refusal to compensate Plaintiff for damages results in a violation of the *Order*, absent gross negligence, and the only issue left to be litigated is whether or not Plaintiff engaged in gross negligence, then Plaintiff would be willing to exclude Section 7.1 of the *Agreement* from the jury. Absent such a stipulation by Defendants, however, Section 7.1 must be admitted as it is not only relevant, but the Court’s recent ruling on the *Agreement* provides the basis for the only issue left to be litigated.

IV. **The Accident Reports Must Not Be Admissible For Any Purpose:**

Plaintiff agrees with Defendant that evidence of accident reports filed with the Federal Railroad Administration is not admissible. 49 U.S.C. §20903 reads as follows:

“No part of an accident or incident report filed by a railroad carrier under §20901 of the title or made by the Secretary of Transportation under §20902 of this title may be used in a civil action for damages resulting from a matter mentioned in the report.”

49 U.S.C. §20903

Evidence of such reports is also not admissible to refresh witness' recollections or to impeach witnesses as to any other purpose. There is no language found anywhere in 49 U.S.C. §20903 limiting the statute to a party's direct case. Instead, the statute presents an outright prohibition against the use of such reports "in any civil action for damages." 49 U.S.C. §20903. As such, the reports should not be admissible for any purpose, including to refresh witnesses' recollections or to impeach witnesses.

V. **Conclusion**

WHEREFORE, for the foregoing reasons, the plaintiff NECR respectfully requests that the defendants' *Motions in Limine* be DENIED.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(D), the plaintiff NECR respectfully states that oral argument may assist the Court and requests a hearing on its *Opposition* to the Defendants' *Motions in Limine*.

Respectfully submitted,
NEW ENGLAND CENTRAL RAILROAD, INC.,
by its attorneys,

/s/ Michael B. Flynn
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(617) 773-5500

Dated: August 24, 2007

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NEW ENGLAND CENTRAL
RAILROAD, INC.

Plaintiff,

COPY

vs.

Civil Action No.
04-30235-MAP

SPRINGFIELD TERMINAL RAILWAY
COMPANY, ET AL.

Defendants.

DEPOSITION

-of-

MICHAEL LAWYER

Taken on Tuesday, January 9, 2007,
at the offices of
New England Central Railroad, Inc.
St. Albans, Vermont.

15 || APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

16 RICHARD A. DAVIDSON, JR., ESQ.

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Quincy, MA 02169

ON BEHALF OF THE DEFENDANT:

19 ROBERT B. CULLIFORD, ESQ.

Senior Vice President and General Counsel

20 Pan Am Systems

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14 Aviation Avenue

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Portsmouth, NH 03801

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COURT REPORTERS ASSOCIATES
117 BANK STREET
BURLINGTON, VT 05401
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1 the record, can we call the handwritten portion of
2 Exhibit 1, 1B, and the typed one 1A?

3 BY MR. CULLIFORD:

4 Q. Okay. I think we're done with those now,
5 after that sort of belabored attempt to figure out
6 what they were. Okay, I'd like to ask you to take a
7 look at this document, as well.

8 A. Okay.

9 Q. Have you ever seen that document before, sir?

10 A. Yes, I have.

11 Q. Do you know what that document is?

12 A. Yes.

13 Q. Could you identify it?

14 A. Sorry?

15 Q. Could you identify it?

16 A. This is the inspection report from the
17 geometry car run by the FRA on June 8th, 2004.

18 (Deposition Exhibit 2 was marked for
19 identification.)

20 BY MR. CULLIFORD:

21 Q. If you could turn to page the page identified
22 with Bates stamp numbers 000803.

23 A. Sure.

24 Q. I'd refer you -- there's a dash mark to the
25 left side of that document?

1 to some extent?

2 A. Outside of the regulation, I'm not aware of a
3 guideline.

4 Q. Okay. So you're not aware of a theory, let's
5 call it for now, that rock would be more likely to
6 occur under these conditions at a slower speed?

7 A. A theory, no. I'm familiar with the
8 regulation only.

9 Q. Do the regulations say that rock would -- the
10 slower the speed, the more likely rock would occur?

11 A. No, it doesn't speak to rock. It -- you asked
12 what a car would do if it gave -- if it was
13 subjected to this condition.

14 Q. Yeah.

15 A. And I told you it would rock. That's why
16 there's a restriction placed on it, but I don't know
17 of any guidance from the FRA that tells you this
18 specifically.

19 Q. Would anyone from New England Central be aware
20 of that?

21 A. Not to my knowledge.

22 Q. Are you familiar with the term, "wheel lift"?

23 A. Yes.

24 Q. Could you describe what that refers to -- in
25 to your knowledge in the railroad industry,

EXHIBIT 2

Page 1

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NEW ENGLAND CENTRAL
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Plaintiff,

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SPRINGFIELD TERMINAL RAILWAY
COMPANY, ET AL.

Defendants.

D E P O S I T I O N
-of-
RICHARD R. BOUCHER

Taken on Wednesday, January 10, 2007,
at the offices of
New England Central Railroad, Inc.
St. Albans, Vermont.

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:
RICHARD A. DAVIDSON, JR., ESQ.
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Quincy, MA 02169

ON BEHALF OF THE DEFENDANT:

ROBERT B. CULLIFORD, ESQ.
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Pan Am Systems
14 Aviation Avenue
Portsmouth, NH 03801

NORMA J. MILLER, RPR
COURT REPORTERS ASSOCIATES
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Page 14

1 Q. Okay. Based on this walking the track, did
2 you come up with a scope of work to be performed?

3 A. Not totally that day, no.

4 Q. Okay. Subsequent to that day?

5 A. I did just a preliminary basic repairs to run
6 trains.

7 Q. Okay. Did you walk the track alone, or was
8 anybody else with you?

9 A. Mike Lawyer was there. I don't remember now
10 if he actually walked with me. He had walked some
11 of it, I believe, before me.

12 Q. Was anyone from ECI with you?

13 A. I don't remember if they were there the first
14 day or not.

15 Q. Just so we're clear, by ECI, I refer to
16 Engineers Construction, Inc.?

17 A. Yes.

18 Q. Could you identify who Engineers Construction,
19 Inc., is?

20 A. Who they are?

21 Q. Yes.

22 A. Yeah.

23 Q. Who are they?

24 A. They're a contractor.

25 Q. For New England Central?

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1 A. Right, right.

2 Q. I'm talking about the section from Milepost 5
3 up to right before they fell off the tracks.

4 A. Yeah, I was involved with that.

5 Q. Okay, with ECI?

6 A. Not with ECI. They went in later. My
7 involvement was the temporary repairs.

8 Q. Okay.

9 A. And I went through and marked the ties, or
10 assisted in marking the ties to be replaced. ECI
11 came in and did the tie replacement. They were
12 contracted to do the tie replacement.

13 Q. And you didn't work with ECI at all?

14 A. On the actual replacement? From -- No, I was
15 down there a couple times through the course of the
16 project. It went on for quite some time.

17 Q. You weren't given invoices to review and
18 approve?

19 A. I don't get involved in that.

20 Q. Who would?

21 A. The roadmaster.

22 Q. You weren't involved in any services provided
23 by Vermont Rail, either?

24 A. As far as --

25 Q. As far as equipment provided, labor provided,

EXHIBIT 3

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RAILROAD, INC.

COPY

Plaintiff,

vs.

Civil Action No.
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SPRINGFIELD TERMINAL RAILWAY
COMPANY, ET AL.

Defendants.

DEPOSITION

-of-

RICK T. BOUCHER

Taken on Wednesday, January 10, 2007,
at the offices of
New England Central Railroad, Inc.
St. Albans, Vermont.

15 APPEARANCES:

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COURT REPORTERS ASSOCIATES

1 New England Central?

2 A. Yes.

3 Q. Were you inspecting the stretch of track
4 between Milepost 11 and Milepost 5?

5 A. Yeah.

6 Q. During the course of your inspections, did you
7 ever note a defect at Milepost 10.16?

8 A. No.

9 Q. You did not? After June 8th, 2004, did anyone
10 inform you that the test car had found a defect in
11 Milepost 10.16?

12 A. Yes.

13 Q. Who informed you of that?

14 A. Supervisor.

15 Q. Do you recall -- would you have been involved
16 at that point in deciding the appropriate remedial
17 action to be taken in response to that defect?

18 A. No.

19 Q. Who would have?

20 A. It was supervisor.

21 Q. And by supervisor, just who are you referring
22 to?

23 A. R.R. Boucher.

24 Q. Okay. Did he ever -- did R.R. Boucher ever
25 communicate to you what remedial action was taken in

1 Q. I understand that. You did an initial
2 measurement to confirm the test results, correct?

3 A. Correct.

4 Q. What I'm asking you is were there any
5 subsequent measurements of the condition at Milepost
6 10.16 between your initial measurement and July 3rd,
7 2004, I guess I don't understand your question.

8 Q. Pardon me?

9 A. I guess I don't understand your question.

10 Q. You performed one measurement, if I understand
11 what you're saying, soon after the test truck went
12 over the line?

13 A. That's correct, yeah.

14 Q. All's I'm asking is did you do another
15 measurement after the initial one? We've got one in
16 the book.

17 A. Yeah.

18 Q. Did you ever do another measurement between
19 that initial measurement and July 3rd, 2004?

20 A. Not that I can recall, I guess, no.

21 Q. Do you recall going out there at your
22 twice-weekly inspections and noticing that the
23 condition remained the same, or was it worsening or
24 was it getting better?

25 A. To my knowledge, it remained the same.

EXHIBIT 4

Page 1

UNITED STATES DISTRICT COURT
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NEW ENGLAND CENTRAL
RAILROAD, INC.

Plaintiff,

VS.

Civil Action No.
04-30235-MAP

SPRINGFIELD TERMINAL RAILWAY
COMPANY, ET AL.

Defendants.

D E P O S I T I O N
-of-
STEVEN LARRO

Taken on Wednesday, January 10, 2007,
at the offices of
New England Central Railroad, Inc.
St. Albans, Vermont.

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

RICHARD A. DAVIDSON, JR., ESQ.
Flynn & Associates, P.C.
400 Crown Colony Drive, Suite 200
Quincy, MA 02169

ON BEHALF OF THE DEFENDANT:

ROBERT B. CULLIFORD, ESQ.
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1 Wednesday, January 10, 2007, 9:35 a.m:

2 STEVEN LARRO, being duly sworn, deposes and
3 says as follows:

4 * * *

5 EXAMINATION

6 BY MR. CULLIFORD:

7 Q. Morning, sir.

8 A. Morning.

9 Q. Could you state your name and address for the
10 record, please?

11 A. Steven E. Larro. L-A-R-R-O. And the current
12 address is Box 98, Swanton, Vermont.

13 Q. And could you give us just a rough history of
14 your professional background?

15 A. I have approximately 30 years in the railroad
16 industry, between Mechanical Department and
17 Transportation.

18 Q. What is your position today?

19 A. Right now I'm an engineer.

20 Q. An engineer of track, or an engineer as a
21 locomotive?

22 A. A locomotive engineer.

23 Q. In June of '04, what was your position?

24 A. I was Trainmaster.

25 Q. With the NECR?

1 A. That is correct.

2 Q. How long had you been in that position as of
3 June of '04?

4 A. Approximately a year.

5 Q. Were you still in that position in July of
6 2004?

7 A. Yes.

8 Q. Today we're going to talk about a stretch of
9 track on the New England Central between
10 approximately Milepost 11 and Milepost 5. Are you
11 familiar with that area?

12 A. Yes, sir.

13 Q. And we're also going to be talking about an
14 FRA test car inspection of the NECR conducted on
15 June 8th, 2004. Are you aware of that test car
16 inspection?

17 A. We do them periodically.

18 Q. But what I'm asking is, I guess specifically,
19 are you aware of the results of that FRA test car
20 inspection on June 8th, 2004?

21 A. No, sir.

22 Q. You're not?

23 A. No.

24 Q. Did anyone ever tell you that the test car
25 inspection had discovered a defect at Milepost

1 Q. What were your job duties as trainmaster for
2 New England Central?

3 A. Coordinate crews, movement of traffic over the
4 line, federal test.

5 Q. Did you have a specific territory, or was it
6 the entire New England Central?

7 A. It wasn't the entire. It was basically the
8 Canadian border to Bellows Falls, Vermont.

9 Q. Would that include Milepost 11 to Milepost 5,
10 approximately?

11 A. Yes, sir.

12 Q. So is it your testimony that if a test
13 inspection was done, no one would communicate the
14 results of that to you?

15 A. They would communicate the results, as far as
16 them finding slow orders and how we would coordinate
17 train movements to work around the slow orders.

18 Q. Okay, can you walk me through that? How would
19 the slow order -- why would the slow order arise?

20 A. If an FRA inspection should find defects in
21 the track.

22 Q. Okay. And how would that existence of that
23 slow order be communicated to you?

24 A. It would either be in writing or direct
25 communication with track supervisor.

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1 Department, Mechanical, will get involved there.

2 The experts. Locomotives are downloaded and --

3 Q. What if there was an issue of train handling?

4 A. That would be Transportation.

5 Q. Okay. What if there was an issue with how the
6 crew was responding to conditions?

7 A. That would be determined, you know,

8 collectively. Everything would be determined
9 collectively, all the --

10 Q. Would Transportation be involved in that
11 investigation?

12 A. Yes.

13 Q. Would you, as Trainmaster, be involved in an
14 investigation of a derailment in your territory
15 where the crew's conduct was questioned?

16 A. Conceivably.

17 Q. Were you involved in this investigation?

18 A. No, I was not.

19 Q. Are you aware that the crew's conduct has been
20 questioned in this derailment?

21 A. I was aware of that.

22 Q. Then why wouldn't you be involved in the
23 investigation?

24 A. It went to experts, if you will. I don't have
25 the expertise or the training to make those